In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 107

ERNEST KREHER, MAX KREHER, PAUL KREHER, TRUSTEES OF TAMPA SHIPBUILDING AND ENGINEERING COMPANY, A DISSOLVED CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 33-46) is reported at 87 F. Supp. 881.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 46). A motion for a new trial was denied on March 6, 1950 (R. 46).

The petition for a writ of certiorari was filed on June 2, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Claims erred in finding that there was no taking by the Government of any of petitioners' property.

STATEMENT

This action was brought in the names of the three petitioners as trustees of the Tampa Shipbuilding and Engineering Company,[1] a dissolved corporation. Petitioners sought the sum of $2,078,000 as just compensation for the alleged taking of the properties of the company by the United States.

On May 21, 1938, the company entered into contracts with the United States, acting through the Maritime Commission, for the construction of four vessels (R. 5). To enable it to proceed with the construction, it borrowed $1,168,000 from the Reconstruction Finance Corporation (R. 6). Of this amount $880,000 was applied in repayment of a former loan, plus interest of $88,000 accrued and unpaid thereon (R. 6). This left the company a balance of $200,000, which sum represented the participation in the loan by the First National Bank of Tampa and the Exchange National Bank of Tampa (R. 6). The loan was secured by a mort-

[1] Hereinafter referred to as the company.

gage and deed of trust, running to the Exchange National Bank of Tampa as trustee, of which Mr. George B. Howell was trust officer (R. 6). Among other provisions, the deed of trust authorized the trustee to take over the management of the company whenever such management was considered unsatisfactory by the R. F. C. (R. 6). At the same time, the company borrowed an additional $300,000 from the R. F. C., secured by a second mortgage, and also arranged for lines of credit from the steel and engine suppliers, to secure additional capital (R. 7).

On December 31, 1948, agreements supplemental to the construction contracts were entered into between the company and the Maritime Commission (R. 7). These agreements were advantageous to the company, and, most importantly, provided for more liberal progress payments by the Commission (R. 7). During the negotiations for these supplemental agreements, the Commission received, from its representatives at the company's shipyard, reports which were critical of the company's organizational set-up (R. 35). Officials of the Commission, and petitioner Ernest Kreher, president of the company, had conferences, therefore, with respect to supervisory personnel of the company (R. 8). As a result of these discussions, an organization chart of the company was prepared, and was accepted by the company, by letter of December 21, 1938, signed by Ernest Kreher, president, as "set-

ting forth a proper and necessary organization for the performance of the contracts" (R. 8). During the next month, the company employed four of the executives whose names appeared on the chart (R. 9-10).

In the summer of 1939 the Maritime Commission advertised for bids for the construction of additional vessels of the same type as those under construction by the company (R. 10). The company's bid was accepted and contracts for the construction of four additional vessels were executed November 27, 1939 (R. 10-11). On November 21, 1939, however, the chairman of the Maritime Commission had written the company that its organizational set-up was unsatisfactory to the Commission, that a capable person, satisfactory to the Commission, should be selected as general manager of the company, and that the contracts would be executed with the understanding that the company would appoint such a person (R. 10-11). The company endorsed its acceptance of the requirement upon a copy of the Commission's letter and returned it with such endorsement to the Commission (R. 11). Thus, contracts for the additional vessels all contained the proviso that "the management and operating organization of the [company] shall at all times during the period of this contract be satisfactory to the Commission" (R. 11). Shortly after the execution of the contracts the Commission, by letter of December 20, 1939, recommended

a member of its staff, one P. B. Brill, for the position of general manager, and suggested that the company make arrangements for his employment, "if he is satisfactory to the [company]" (R. 12). Subsequent to this letter, Mr. Brill was appointed by the company as general manager (R. 12-13).

In connection with these contracts, it was again necessary for the company to secure R. F. C. financing, the normal commercial channels apparently still being closed to the company. An additional loan of $900,000 was secured, therefore (R. 11). In addition to this loan, the R. F. C. had, on April 26, 1939, made an additional loan of $35,000 to the company, applicable to the construction of the first four vessels (R. 12).

Throughout the year 1940, as the company continued the construction of the eight vessels, its financial position became increasingly precarious. This was not due to anything which occurred in 1940, but was simply a continuation of events started in 1938, when the company first agreed to build vessels for the Maritime Commission (R. 13). In the case of Hull No. 33, for example, the first of the eight vessels completed, the company showed a loss of more than $320,000 (R. 13). By September 30, 1940, the company's assets [exclusive of any equity which it may have had in the ships then under construction] were $2,977,340.12, and its liabilities [exclusive of advances by the Maritime Commission of $6,548,396.57] amounted to $3,-

716,432.28 (R. 13-14). By giving the company the greatest possible credit of $345,000 for its equity in the vessels under construction, its liabilities still exceeded its assets by about $394,000 (R. 14). Moreover, the bulk of its assets was non-liquid, while most of its liabilities were current, and many creditors were making urgent demands for their money and some were threatening to sue (R. 14).

Thus, in the fall of 1940 the company was in dire financial straits. It was unable to meet the payment due in that year on the principal and interest on its R. F. C. loan, and officials of the R. F. C. had indicated to the company that they would be compelled to foreclose (R. 15, 42). The Maritime Commission was also understandably concerned with the rather hopeless plight of the company. The Commission desired to obtain the completed vessels clear of liens and claims and was also concerned about the problem of the security for the large progress payments that had been made (R. 15, 42). At this point, Mr. George Howell again entered into discussions concerning the company's financial condition and the condition of its work under the contracts, with officials of the Maritime Commission and the R. F. C. (R. 15).[2]

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[2] Mr. Howell, because of friendship for the petitioners and a desire to maintain a flourishing shipyard in Tampa, had assisted the company throughout its negotiations with these two agencies and had been largely instrumental in the securing of the various loans and working out the preliminary details in connection with the awarding of the various contracts (R. 16).

Many discussions were also had by these officials about these matters with petitioner Ernest Kreher (R. 15).

Various alternatives were considered by these agencies, to avoid default by the company, which seemed probable (R. 15). Finally, officers of the R. F. C. prevailed upon Mr. Howell to agree to assume the management of the company, contingent upon securing additional funds for the completion of the vessels without loss (R. 15).[3] Unsuccessful attempts were made to sell the entire business, and the possibilities of securing new capital for the business were explored (R. 15). A method of securing these additional funds became apparent when, during the course of these discussions with Mr. Howell, the Navy approached the Maritime Commission with the request that several of the vessels then under construction for the Commission be turned over to the Navy for conversion into naval auxiliaries (R. 21-22). Negotiations were had between the Commission and the Navy, and the following plan was agreed upon: (1) a new corporation would be formed, which would purchase the assets and assume the liabilities of the company; (2) prior to the sale, the company would give the Commission notice of default under the con-

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[3] Mr. Howell was induced to do this because of representations he had made to the R. F. C., while he was assisting the company in negotiating its various loans, that he would continue his interest in the company and its affairs until the loans were liquidated (R. 16).

tracts for the three vessels of the first group still under construction; (3) upon such default the Commission would take possession of these three uncompleted hulls and sell them to the new corporation for an amount equal to the advances which had theretofore been made by the Commission to the company; (4) the new corporation would resell these hulls to the Navy at a somewhat higher price, and would enter into contracts with the Navy for their conversion into naval auxiliaries; (5) the new corporation would agree to pay to the United States any profits which it might make on completing the vessels covered by the company's contracts with the Commission, and, if those profits did not equal $500,000, to pay the difference out of its profits on any other Government business it might receive (R. 22).

After extended negotiations with representatives of the Maritime Commission and the R. F. C., as well as with petitioner Ernest Kreher, Mr. Howell addressed to those two agencies, under date of October 29, 1940, a letter in which he agreed to undertake a reorganization of the company on substantially the terms outlined above (R. 16-21). This letter was presented to a special meeting of the stockholders of the company, held in Tampa on November 9, 1940 (R. 23). At this meeting, at which holders of 5,720 shares out of the 7,153 shares outstanding were present in person or by proxy, Mr. Howell's letter was read and discussed

extensively (R. 23, 45). The following resolution was then unanimously adopted (R. 23-24):

> *Resolved,* that the Plan of Reorganization set forth in Paragraphs Numbered 1 to 19, inclusive, of the letter to the United States Maritime Commission and Reconstruction Finance Corporation, dated October 29, 1940, * * * be and hereby is approved and adopted; subject to such changes therein as the Board of Directors of this Corporation may deem necessary or advisable; and
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> *Further Resolved,* that this Corporation sell all of its assets of any kind or nature whatsoever, either real, personal or mixed, and tangible or intangible, including the right to use its corporate name or any modification thereof, except its corporate franchise, to Tampa Shipbuilding Company, Incorporated, in consideration of Tampa Shipbuilding Company, Incorporated, assuming all of the liabilities and obligations of the Corporations; and,
>
> *Further Resolved,* that the officers of this Corporation be, and they hereby are authorized and directed to do all acts and things and execute all papers, documents and instruments which they deem necessary or desirable to fully carry out and consummate the said Plan of Reorganization, the said sale of all assets of this Corporation to Tampa Shipbuilding Company, Incorporated, and all action approved by the stockholders at this meeting.

On November 12, 1940, the company executed a bill of sale, conveying and transferring all of its personal property to the new corporation, Tampa Shipbuilding Company, Inc., and also a warranty deed conveying its real property to the new corporation, subject to the R. F. C. mortgages upon the property (R. 24). The reorganization was actually consummated two days later, on November 14, 1940. On that day, the company wrote the Maritime Commission that it was financially unable to meet its obligations and found it impossible to perform the contracts for the three vessels of the first group under construction (R. 22). The Commission replied by letter of the same day, acknowledged the default and informed the company that it would sell the three vessels (R. 22-23).

Simultaneously, the reorganization agreement was entered into between the company and Tampa Shipbuilding Company, Inc. (R. 26-27). Article I of the agreement related the sale by the old company to the new company of all of the assets of the old company, "real, personal or mixed, tangible or intangible, of every kind and nature whatsoever except only its corporate franchise", while Article 3 set forth the assumption by the new company of the indebtedness and other obligations of the old company (R. 27). Article 2 of the agreement, and the supporting schedules, set forth "a proper allocation of the assets of the company as compared to the liabilities assumed" in consideration of such

acquisition, as set forth in paragraph 5(ii) of Mr. Howell's letter of October 29, as it had been approved at the meeting of the stockholders of the old company on November 9, 1940 (R. 27-31).

The reorganization was thereafter completed according to plan. The Maritime Commission sold the three vessels to the new corporation for the amount of the advances theretofore made on the purchase price, and the new corporation resold them to the Navy (R. 31). The amount of such advances was $4,613,247.67 (R. 27), and the amount paid by the Navy was $5,513,248.00 (R. 31). In addition, the Navy entered into a contract with the new corporation for the completion of these three vessels for the aggregate amount of $1,026,-752.00 (R. 31). It assumed the obligation of the old company to complete the four vessels of the second group at the prices and on the terms originally agreed upon (R. 28, 32). All the stock of the new corporation was issued in Mr. Howell's name, and was pledged by him as security for loans made by the R. F. C. (R. 32). No profits were made by the corporation on the completion of the vessels (R. 32). Some profit was made on Navy contracts for reconversion of other vessels (R. 32).

Because of the advent of the war, the new company secured additional contracts for the construction and conversion of ships, and did earn profits on this business (R. 32). These profits enabled it to pay off the debts of the old company, which it

had assumed, thereby securing the release of the new company's stock from the pledge agreement (R. 31, 32). When this was done, one share of non-voting stock was given to each stockholder of the old company for each two shares he had previously held, some shares of voting stock were distributed to key employees of the new company, and the balance were retained by Mr. Howell (R. 31). Dividends were thereafter paid on this stock out of earnings, aggregating about 20 per cent of the par value (R. 32).

Late in 1945 a private syndicate made an offer to Mr. Howell to purchase his voting stock in the new company (R. 32). He refused to sell unless the offer was also made to the other stockholders for the purchase of their stock, and $100 a share was offered for the non-voting stock and $200 a share for the voting stock. This offer was accepted by practically all stockholders (R. 32).

The old company was dissolved on June 1, 1945, for non-payment of its franchise taxes, and its directors became trustees thereof (R. 4-5). Three of the six directors joined as trustees in the present action in suing the United States for $2,078,000 in the Court of Claims. Though a fair reading of the amended petition (R. 1-3) raises serious doubts as to just what cause of action petitioners are attempting to assert or what acts of confiscation petitioners rely on, the court below states that petitioners' claim "is, in substance, that the defendant's

preparation of the organization chart and its suggestions, as shown in the findings, of the men who should be appointed to the positions shown thereon, amounted to the taking over by defendant of complete control of the business of the corporation; and that the action of the officials of the Maritime Commission and the Reconstruction Finance Corporation, in prevailing upon George B. Howell to form a new corporation to take over the properties of the old company and forcing the officers and stockholders of the old company to agree to such plan, constituted a taking by the Government under the Fifth Amendment, of the entire properties of the Tampa Shipbuilding and Engineering Company" (R. 43). The Court of Claims, finding that there was "no merit in any of these contentions", dismissed the case (R. 43, 46).

ARGUMENT

1. Petitioners, in their argument to this Court, have apparently abandoned the groundless contention, advanced in the court below, for damages for alleged unlawful interference in the business and affairs of the company in 1939 and 1940. Instead, petitioners here rely on an alleged taking by the Government in the fall of 1940 of the assets and business of the company. Petitioners, as the crux of the argument, assert (Pet. 2): "The taking by the Government was accomplished by allowing and directing its representatives, trustee and em-

ployees, who paid neither a cent nor invested a nickel therein, to organize and operate for the benefit of the United States a corporation known as the Tampa Shipbuilding Company, a corporation." Even if this statement were true, petitioners have not asserted a claim against the United States. Nothing could be better settled in the field of eminent domain than that property is taken in the constitutional sense only when the defendant has deprived the owner of the title or use of his property without his consent. *United States* v. *Sponenbarger,* 308 U. S. 256; *Montana Co.* v. *St. Louis Mining and Milling Co.,* 152 U. S. 160, 169; *Kellettville Gas Co.* v. *United States,* 56 F. Supp. 919 (W.D. Pa.). Here, no property was vested in the United States and no orders or regulations were ever issued vesting the assets of the company in the Government. The Government, as the court below observed, "acquired no benefit from the sale to the new company except the indirect benefit of having the ships completed free of claims, at about the time the old company had originally agreed to deliver them, without the expense and delay incident to bankruptcy, receivership, or foreclosure proceedings" (R. 45). Moreover, the plan of reorganization whereby the property of the old company was sold to a new, a private corporation, was approved by the stockholders and officers of the old company (R. 45).

It is equally well settled that there can be no recovery against the United States as for the taking of property absent a showing of definitive acts by the Government to appropriate such property and absent a showing of governmental intent to so take. *Mitchell* v. *United States,* 267 U. S. 341; *Willink* v. *United States,* 240 U. S. 572; *Goodman* v. *United States,* 28 F. Supp. 497 (S.D. Iowa), affirmed, 113 F. 2d 914 (C.A. 8). Certainly, in this case, there have been no such showings of definitive steps or intent on the part of the Government to appropriate the company as a going concern. The record discloses the sale of the old company to a privately owned corporation in consideration of the assumption of the old company's very substantial debts and liabilities.

Even if it could be argued that the reorganization plan constituted a taking by the Government, the United States would not be liable for compensation since, due to the hopelessly insolvent condition of the company, nothing of value would have been taken. See *Marion and Rye Valley Ry.* v. *United States,* 270 U. S. 280; *Roberts* v. *New York City,* 295 U. S. 264. The claims asserted by petitioners as elements of value of the property allegedly taken are completely devoid of merit. Although they sought recovery of $2,078,000 in the Court of Claims (R. 3), petitioners, in their petition to this Court, seek the sum of $957,278.94 plus $423,031.52 ($1,380,310.46) or, in the alternative, $1,280,000 (Pet.

7). Petitioners assert that the sum of $957,278.94 represents the excess of assets over liabilities of the company at the time of the alleged taking (Pet. 7). This claim approaches the frivolous for by their own account (Pet. 7), petitioners blandly admit that in arriving at this figure they did not include the indebtedness of the company on the seven hulls under construction—an amount in excess of one and a third million dollars (R. 27). Petitioners claim the amount of $423,031.52 as the profits earned by the new company in completing the seven vessels it acquired (Pet. 7). It is thoroughly well established, however, that loss of profits are noncompensable (*Mitchell* v. *United States,* 267 U. S. 341; *Joslin Manufacturing Co.* v. *Providence,* 262 U. S. 668)—and especially so in this case, where the profits were derived, not under the company's contracts, but under new contracts which the new company entered into with the Navy (R. 32). In the alternative, petitioners claim that they should be paid the sum of $1,280,000, the amount realized by the Class B stockholders upon the sale of the stock of the new corporation in 1945 (Pet. 7). Petitioners allege that this sum "represented the value of the property, in part, after the Navy had completed its ship contracts and World War II came to an end" (Pet. 7). Thus, petitioners admit that this figure does not represent any value the company might have had at the time of reorganization. It is established law, however, that damages

of compensation are evaluated as of the time of the alleged taking. *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662; *Olson* v. *United States*, 292 U. S. 246. In any event, the money received from the sale of this stock was not received by the Government, but by the Class B stockholders of the new company.

2. Aside from the total absence of merit in petitioners' case, it should be noted that petitioners lack standing to prosecute the action at all, and the Court of Claims so found (R. 43). When the old company was dissolved, the assets of the company, including any claim which it might have against the United States, vested in six joint trustees. In such a case, the universally accepted rule is that the powers and authority of the co-trustees are equal and undivided. They must act as a unit and where one or more of the co-trustees refuses to join in a proposed action, the others cannot proceed without him, but must make application to the court having jurisdiction over the administration of the trust, for instructions as to the proper action to be taken. *Bagnell* v. *Ives*, 184 Fed. 466 (C.C. M.D. Pa.); *Irwin* v. *Larson*, 94 F. 2d 187 (C.A. 5). There is nothing in the Florida statutes dealing with the administration of the affairs of a dissolved corporation which would permit any deviation from this basic rule in the administration of trusts. Only three of the six director-trustees, however.

joined in the bringing of their suit. Accordingly, the court below, and we submit rightly so, held that the case should be dismissed for lack of authority in three of the six trustees to prosecute the case under Florida law (R. 43).

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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